In The

SUPREME COURT OF THE UNITED STATES

No. 77-584

UNITED STATES OF AMERICA

vs.

DAVID NEUSTEIN

DAVID NEUSTEIN,
Petitioner

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

HAROLD GONDELMAN
BASKIN, BOREMAN, WILNER,
SACHS, GONDELMAN & CRAIG

Attorneys for Peitioner

10th Floor, Frick Building
Pittsburgh, Pa. 15219

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In The

SUPREME COURT OF THE UNITED STATES

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No._____

_____

_____Term, 1977

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UNITED STATES OF AMERICA,

vs.

DAVID NEUSTEIN

DAVID NEUSTEIN

DAVID NEUSTEIN,
Petitioner

_____

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

_____

David Neustein, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

Opinions Below

The judgment order of the court of appeals entered September 6, 1977 is attached hereto as Appendix A, infra (pp. 1a - 2a). The order of the court of appeals sur petition for rehearing is attached hereto as Appendix B, infra (pp. 3a - 4a). The opinion and order of the district court on defendant's motion for new trial entered February 10, 1977 is attached hereto as Appendix C, infra (pp. 5a - 7a).

Jurisdiction

The judgment of the court of appeals was entered on September 6, 1977 (App. A, infra, pp. 1a - 2a). A petition for rehearing was denied on October 3, 1977 (App. B, infra, pp. 3a - 4a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

Question Presented

1. Where the only evidence before the district court establishes as a fact that counsel for defendant did not interview a single witness nor make any investigation of the facts so as to render effective assistance of counsel to a defendant on serious criminal charges, did not the court of appeals and the district court err in failing to find that defendant was denied his Sixth Amendment rights?

Constitutional Provision Involved

The Sixth Amendment to the Consitution of the United States provides, inter alia, as follows:

> "In all criminal prosecutions the accused shall enjoy the right . . . to have the assistance of counsel for his defense."

Statement

The prosecution in this case involved a five-count indictment charging mail fraud and conspiracy to commit mail fraud. The conspiracy count sets forth nineteen (19) alleged overt acts in furtherance of the conspiracy. The indictment alleges that Neustein conspired with five unindicted co-conspirators to obtain money from insurance companies by destroying a building by arson. The indictment was returned on March 3, 1976. The beginning date of the alleged conspiracy was on or about September 1, 1970 and a superseding indictment on which the defendant was tried and convicted was filed on May 12, 1976.

The petitioner, Neustein, had successfully brought civil actions against the insurance companies for damages as a result of the same fire which was the subject of the criminal indictment and had recovered a civil judgment in the state court.

After trial, the jury returned a verdict of guilty on all five counts. Motions in arrest of judgment and for a new trial were filed by trial counsel and argument fixed on said motions. Present counsel was obtained by petitioner and after the court below refused to extend the time for argument, present counsel did not enter the case until after the motions were denied and a date fixed for sentencing. Before sentence, present counsel filed an affidavit in support of motion for new trial (App. D, infra, pp. 8a - 23a). The district court denied the motion without hearing and on February 11, 1977 fifteen (15) character witnesses appeared and testified, even after the conviction, as to the excellent reputation of the petitioner in the community. The district court sentenced petitioner-defendant to five years in prison and imposed a fine of $14,000.00. An appeal was taken to the Court of Appeals for the Third Circuit and the matter was fixed for argument for September 6, 1977. Counsel was advised that there would be no oral argument allowed and on September 6, 1977 the judgment order, without opinion, was filed affirming the lower court. A petition for rehearing was filed and denied.

Reasons for Granting the Writ

The Sixth Amendment to the Constitution of the United States assures every defendant in the criminal case

the right to counsel. Since Powell v. Alabama, 287 U.S. 45, 53 S. Ct. 55 (1932), the constitutional right to counsel includes the right to the effective assistance of counsel.

The American Bar Association Project on Standards for Criminal Justice Relating to the Prosecution Function and Defense Function, imposes the duty on defense counsel to explore all avenues leading to facts relevant to guilt. Paragraph 4.1 encompasses the duties of defense counsel in investigating matters and provides as follows;

"4.1 Duty to investigate.

It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to guilt and degree of guilt or penalty. The investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused's admissions or statements to the lawyer of facts constituting guilt or his stated desire to plead guilty." (Emphasis added)

In the discussion of the investigative functions of a defense lawyer, the Standards state what should be obvious, and that is

"Facts are the basis of effective representation. Effective representation consists of much more than performing the advocate's function in the

courtroom. Adequate investigation may avoid any courtroom confrontation. As previously noted, considerable ingenuity may be required to locate persons who observed the criminal act charged or who have information concerning it. After they are located, their cooperation must be secured. It may be neccessary to return to a witness several times to raise new questions in the light of facts learned from others. The resources of scientific laboratories may be required to evaluate certain kinds of evidence; analysis of fingerprints or handwriting, clothing, hair or blood samples, or ballistics tests may be necessary. Neglect of any of these steps may preclude the presentation of an effective defense . . . ." (page 226) (Emphasis added)

The Standards further state:

"The relationship of effective investigation by the lawyer to competent representation at trial is patent, for without adequate investigation he is not in a position to make the best use of such mechanisms as cross-examination or impeachment of adverse witnesses at trial or to conduct plea discussions effectively. He needs to know as much as possible about the character and background of witnesses to take advantage of impeachment . . . The effectiveness of his advocacy is not to be measured solely by what the lawyer does in the trial; without careful preparation he cannot fullfill his role. Failure to make adequate pretrial investigation and preparation may be grounds for finding ineffective assistance of counsel. See Shepherd v. Hunter, 163 F.2d 872, 874 (10th Cir. 1957)." (Pages 227, 228) (Emphasis added)

Your Honorable Court has held in Von Moltke v.

Gillies, 332 U.S. 708, at 721, 68 S. Ct. 316, at 322 (1948), that:

"Prior to trial an accused is entitled to rely upon his counsel to make an independent examination of the facts, circumstances, pleadings and laws involved and then to offer his informed opinion as to what plea should be entered."

The Court of Appeals for the District of Columbia has held in United States v. DeCoster, 487 F.2d 1197 (C.A.D.C. 1973) (DeCoster I), as follows:

"A defendant is entitled to reasonably competent assistance of an attorney acting as his diligent conscientious advocate."

In Moore v. United States, 432 F.2d 730 (C.A. 3, 1970), the Court of Appeals for the Third Circuit remanded the case for an evidentiary hearing on the adequacy of legal services and held that an indigent is entitled to legal services of the same level of competency as that generally afforded at the bar to fee-paying clients. The court then stated:

"In both cases, therefore, the standard of adequacy of legal services as in other professions is the exercise of the customary skill and knowledge which normally prevails at the time and place."

The affirmance of the judgment and sentence in this case allows a record to stand in which the uncontroverted status of the case is that the defendant was represented by counsel who did not comport himself with the standards prescribed by the American Bar Association or the standards prescribed by the Court of Appeals for the Third Circuit in the Moore case, or those established by the Court of Appeals for the District of Columbia in the DeCoster cases, or the standards of your Honorable Court in Powell and Von Moltke, supra.

The issue raised has caused concern in judicial circles as well as bar association meetings throughout the country. See Bazelon, "Defective Assistance of Counsel", 42 U. Cinc. L. Rev. 1; 89 Harvard Law Review 593, at 601; 58 Cornell L. Rev. 1077, at 1086; Legal Profession - Standards of Competency Required to Satisfy the Right to Effective Assistance of Counsel, 51 Notre Dame Law. 1214.

In the Harvard Law Review, supra, at page 601, the author states:

> "Consequently, unless the defendant, aware of the implications of his action, has affirmatively assumed responsibility for the conduct of his defense, a conviction should be reversed if less than reasonably effective assistance was provided by either retained or appointed counsel."

The Court of Appeals for the Fourth Circuit in Coles v. Peyton, 389 F.2d 244, at 226 (C.A. 4, 1968), has mandated minimum standards of counsel in criminal cases and has held that counsel must (1) confer with the client early and as often as necessary; (2) advise him of his rights; (3) ascertain all defenses that may be available and develop all appropriate defenses; (4) conduct all necessary investigations, and (5) allow himself time for reflection and preparation. The Seventh Circuit, in United States ex rel. Williams v. Twomey, 510 F.2d 634 (C.A. 7, 1975), has issued a test of whether a defendant is deprived of legal assistance which meets a minimum standard of professional representation. Se also McQueen v. Swensen, 21 CrLRptr. 2528 (C.A. 8, decided August 23, 1977).

The summary dismissal of petitioner's appeal by the Court of Appeals for the Third Circuit is in conflict with its own decision in Moore v. United States, supra, and is in conflict with the Fourth, Seventh and Eighth Circuit decisions. The affirmance is in conflict with the mandates of your Honorable Court in Von Moltke and Powell, supra.

There is a need for a national standard of minimum requirements under the Sixth Amendment to the Constitution of the United States and for a resolution of the conflicts between the circuits.

Conclusion

The courts, justices and judges have voiced opinions for the need for specialization requirements in various fields of practice. Nowhere are the rights of the citizens of the United States more affected than in the criminal courts. A case which establishes a total neglect of defense counsel in investigating or preparing for trial in a serious federal prosecution mandates that the defendant has been denied effective assistance of counsel. The fact situation in this case provides a forum for the issuance of national standards of competency required of practitioners in the criminal court system of the United States. Only this Honorable Court can mandate such minimum requirements. The petition for writ of certiorari should be granted.

Respectfully submitted,

HAROLD GONDELMAN

BASKIN, BOREMAN, WILNER,
SACHS, GONDELMAN & CRAIG

Attorneys for Petitioner.

APPENDIX A

Judgment Order

UNITED STATES COURT OF APPEALS
For The Third Circuit

No. 77-1283

UNITED STATES OF AMERICA

vs.

NEUSTEIN, DAVID
124 Gilda Ave., Pgh. 15217

David Neustein, Appellant

Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. Drim. No. 76-48-1)

Submitted Under Third Circuit Rule 12(6)
September 6, 1977
Before: ALDISERT, ROSENN and GARTH,
Circuit Judges

Appendix A - Judgment Order

JUDGMENT ORDER

After considering the contention raised by appellant, to-wit, that where it is established that privately retained defense counsel was furnished the names of potential witnesses for the defense but did not interview a single witness in preparation of the defense of the five-count indictment alleging conspiracy and mail fraud, the appellant as established a violation of his Sixth Amendment right to the effective assistance of counsel, it is

ADJUDGED AND ORDERED that the judgment of the district court be and hereby affirmed.

BY THE COURT,

R. J. ALDISERT,
Circuit Judge.

Attest:

THOMAS F. QUINN, Clerk.

Dated: September 6, 1977

APPENDIX B

Sur Petition for Rehearing

UNITED STATES COURT OF APPEALS
For the Third Circuit

No. 77-1283

UNITED STATES OF AMERICA

vs.

NEUSTEIN, DAVID
124 Gilda Ave., Pgh. 15217

David Neustein, Appellant

Present: SEITZ, Chief Judge, and ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS and GARTH, Circuit Judges.

The petition for rehearing filed by Appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having

Appendix B - Sur Petition for Rehearing

voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT,

ALDISERT,
Judge

Dated: October 3, 1977

APPENDIX C

Opinion and Order

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	: :	
	: :	
vs.	: :	Criminal Action
	: :	
DAVID NEUSTEIN	: :	No. 76-48

ORDER

AND NOW, February 10, 1977, a second and separate motion for new trial in the above captioned case, filed February 4, 1977, together with the answer of the United States Attorney, has been considered. The motion was filed by new counsel after our order of January 27, 1977 was filed, denying a motion for New Trial and fixing date for sentence. The instant motion comes long after the expiration of the limits provided by Rule 33. It appears that defendant has obtained new counsel and alleges as a ground for new trial that his original counsel was incompetent but his motion is untimely and is accordingly denied as untimely and lacking merit as well. A review of the transcript of the record demonstrates that defense counsel was competent. He is a mature attorney of considerable experience in this court. He is not required

to function at a degree of competence above that which is normal. Moore v. United States, 432 F.2d 730 (3d Cir. 1970).

The motion attaches an affidavit of defendant, one sentence of which refers to the court and requires some reply. The final paragraph of that affidavit states that "after conviction deponent recognized the failure of counsel to render effective assistance and requested that Harold Gondelman, Esq., be permitted to secure the transcript and file motions on his behalf, which offer was refused by the court so that deponent has also been denied effective assistance of counsel in the preparation and submission of legal points for new trial."

According to the court's recollection, after initial counsel had filed a motion for new trial and a date had been set for argument on the motion, counsel for defendant, Charles Bowers, Esq., and Harold Gondleman, Esq., came to chambers to request that Mr. Gondelman be permitted to associate with intial counsel in briefing and arguing the motion, but on condition that we extend the date for argument and briefing for some sustantial time to allow for Mr. Gondelman's busy schedule since he did not desire to undertake the task unless he was afforded ample time to examine the record and engage in the research he considered necessary. He explained that he could not do

this within the time allowed due to the press of other commitments. The motion for new trial had been filed on September 13, 1976, and argument had been set for October 20, 1976.

No record was made of the conference and the date of the conference is not recorded. The United States Attorney did not attend the conference although counsel represented that he knew of it and had no objection to the conference.

The court did refuse to extend the date for briefing and oral argument to accomodate Mr. Gondelman's schedule, but we did not refuse to permit him to have a copy of the record or assist intial counsel, Mr. Bowers. Mr. Bowers briefed and argued his motion in due course. He was privately retained counsel and as far as we know, Mr. Gondelman was not consulted until some time after the verdict of the jury, which was returned on September 7, 1976. Further, at no time during the unreported conference did Mr. Gondelman indicate that he wanted time to prepare to argue that Mr. Bowers had been incompetent as a grounds for new trial.

/s/ BARRON P. McCUNE
BARRON P. McCUNE
UNITED STATES DISTRICT JUDGE

APPENDIX D

Affidavit in Support of Motion for New Trial

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	
	:	
vs.	:	Criminal No. 76 48
	:	
DAVID NEUSTEIN	:	

AFFIDAVIT OF DAVID NEUSTEIN IN SUPPORT
OF MOTION FOR NEW TRIAL

COMMONWEALTH OF PENNSYLVANIA	:	
COUNTY OF ALLEGHENY	:	ss.

DAVID NEUSTEIN, being duly sworn according to law, deposes and says that:

1. He is the defendant named in the above-captioned proceedings.

2. That at or about the time of the previous indictment in the above-captioned case, or shortly before, he was referred to Charles F. Bowers, Jr., Esquire, as an attorney who is knowledgeable in the criminal law. Said referral was made by Daniel M. Berger, Esquire, deponent's counsel in civil matters.

3. Daniel M. Berger had informed deponent that he would be unable to handle the criminal action against deponent as he would expect to be called as a witness in

the criminal action on behalf of deponent for the reason that Daniel M. Berger had successfully brought and tried a civil action for damages against the insurance company on the policies of insurance on the building involved in the fire alleged in the indictment and which had been defended by the insurance company on the basis that there existed a conspiracy to commit arson and allegations of fraud against your deponent.

4. Your deponent met with Charles F. Bowers, Jr., Esquire for a total of six to eight hours on four or five separate occasions prior to the commencement of the actual trial.

5. Your deponent gave to counsel a list of potential character witnesses, a copy of which is attached hereto, made part hereof and marked Exhibit "A".

6. Your deponent and counsel prepared a list to indicate the order in which character witnesses would be called at the trial, a copy of which list is attached hereto, made part hereof and marked Exhibit "B".

7. On the day before your deponent was to testify on his own behalf, your deponent was told by his counsel that character witnesses would not be called for the reason that counsel thought evidence of an alleged boat burning conspiracy would then be admissible in evidence. Deponent informed counsel that the same matter had been attempted by the insurance companies in the civil trial and that the attempt failed and deponent collected the

insurance proceeds for the fire on the basis of the jury verdict.

a). Counsel for deponent insisted that character witnesses should not be called and stated that deponent would be asked questions concerning his community activities and background in sufficient detail to alleviate the necessity of calling character witnesses. Counsel for deponent did not inquire of these matters when deponent testified on his own behalf.

b). Deponent did not agree that character witnesses should not be called, and counsel for deponent did not interview or talk to any character witnesses although furnished with the names and addresses of such witnesses and said witnesses were available for consultation, interview and conference at the convenience of counsel for deponent.

c). Deponent believes, after reading the transcript, that counsel for deponent was in error when he represented that the Court indicated that the alleged boat burning episode would be admissible for it appears that the Court, in fact, ruled to the contrary.

8. Deponent furnished counsel with the names of ten business persons with whom deponent had business dealings over a period of twenty-five or thirty years to rebut the testimony introduced by the government by alleged unindicted co-conspirators that the manner in which deponent dealt with them was in and of itself

suspicious or circumstantial evidence of guilt. Counsel for deponent did not interview nor did he secure statements from or contact in any way any of said persons.

9. Morris Berger, Esquire, an attorney of approximately fifty years in Pittsburgh and attorney for deponent for many years, together with his sons, was expected to be called as a witness to testify that deponent was compelled to file the proof of loss in the amount of $120,000.00 in connection with the fire referred to in the indictment in order to protect deponent against any possible claim by the witness Fitchwell. To the best of deponent's knowledge, Morris Berger expected to be called as a witness and was not called by counsel for deponent, without consultation with deponent or with Morris Berger.

a). Morris Berger and Assistant District Attorney Edward E. Fagan were available as witnesses to the fact that deponent had brought charges against Fitchwell that he had been beaten by Fitchwell in Schall's presence when resisting extortion. Fagan testified at the civil trial and the testimony was then admitted to by Fitchwell and Morris Berger was counsel to deponent who took deponent to the District Attorney's office. Such testimony was crucial to the defense in light of the testimony of Fitchwell and Schall at the trial but counsel for deponent did not familiarize himself with the facts in the civil trial and did not interview or talk to witnesses who should have been interviewed and who would have had evidence of importance to the defense.

10. Deponent furnished counsel with the names of witnesses who had worked for deponent despite past criminal records for the purpose of demonstrating the efforts of deponent to assist persons who had had difficulty with the law or financial difficulty. Counsel did not interview nor contact any of such witnesses.

11. Deponent discussed with counsel for deponent approximately twenty-three community-wide activities with which he had been engaged for a period of thirty-five years, for the purpose of having such matters established at least by deponent as a witness but which counsel for deponent did not interrogate deponent about as a witness in his own behalf.

12. Deponent's wife, son and mother-in-law attended the entire trial and expressed their desire to testify for and on behalf of your deponent but counsel for deponent refused to call them as witnesses in the defense.

13. Deponent's mother-in-law, Mrs. Ethel Birnbaum, of Miami, Florida, came to Pittsburgh for the trial and deponent was in her apartment the day notice of the fire was received by deponent. Counsel for deponent did not interview Mrs. Birnbaum concerning the facts to which she could have testified in deponent's behalf.

14. On Friday morning, the date deponent was to testify, he informed his counsel about the apparent discrepancies in the claims of government witnesses as to a single delivery of plastics when, at the civil trial, it had

been established there were two deliveries and deponent had so testified. Counsel for deponent expressed surprise that the civil trial contained such testimony and deponent realized at that point that counsel was totally unprepared on the facts of the case.

15. Deponent testified as to two checks made to equipment supply houses being in his own handwriting. It was only on the morning of his testimony that counsel for deponent inquired as to whose handwriting said checks were in and expressed surprise that deponent was willing to identify checks as being in his own handwriting.

16. Counsel for deponent made no investigation concerning deliveries of materials, payments for the same nor did he interrogate, himself or by an investigator, any witness who had material information or might have disclosed material information establishing the defense on behalf of deponent.

17. At the time of counsel for deponent being retained by deponent, it was stated that the fee included up to $1,000.00 for investigation which, to the knowledge of your dponent, was not done in any manner by anyone, including counsel for deponent.

18. Jerome Wojcicki, an official of Equibank, Washington Trust Office, had testified on behalf of deponent at the civil trial against the insurance companies. Counsel for deponent did not meet with nor attempt to meet with nor have a conference with said witness prior

to the trial, despite deponent's disclosure of his name and his participation in the loan arrangements and discussions at Equibank.

a). It was not until after the witness had testified that the deponent was informed by his counsel that he had the witness' grand jury testimony and knew what the witness would testify to at the trial. Counsel had not discussed such testimony with deponent.

b). Had counsel reviewed these matters with deponent, deponent could have, together with Daniel M. Berger, Esquire, clarified the testimony of Wojcicki at the civil trial and conferred with Wojcicki and other officials at Equibank to refresh the memory of the witness as he had testified to previously and thus ferret out the truth.

c). The only preparations the witness Wojcicki evidently had was observed by deponent when the Postal Inspectors and government personnel were discussing the case with Wojcicki in the corridors of the courthouse prior to this testimony.

19. During the lunch recess on the day deponent testified, counsel for deponent cautioned deponent to continue to answer government prosecutors' questions as he had them without being argumentative and counsel for deponent would, on re-direct, clear up any ambiguities which might have resulted from deponent's inability to answer questions fully by reason of government prosecutors' cross-examination. Despite such assurance, counsel

for deponent asked no questions on re-direct.

20. The closing argument of counsel for deponent referred to deponent as

> "So the man is there to make a fast buck and he's not going to ask too many questions about the other people who come to him in a transaction. Okay, granted. It's not very laudable perhaps but it doesn't make him guilty of the crime charged because he was greedy . . .".
> (Tr. p. 480)

21. Although counsel for deponent, in refusing to call character witnesses and in refusing to call other witnesses for deponent, attempted to placate deponent by stating that he would cover these matters in his close to the jury, the close to the jury, an attack upon deponent, readily evidences the ineffectiveness of assistance of counsel.

22. After conviction, deponent recognized the failure of counsel to render effective assistance and requested that Harold Gondelman, Esquire be permitted to secure the transcript and file motions on his behalf, which offer was refused by the Court so that deponent has also

Appendix D - Affidavit in Support of Motion for New Trial

been denied effective assistance of counsel in the preparation and submission of legal points for new trial.

DAVID NEUSTEIN
DAVID N. NEUSTEIN

SWORN TO AND SUBSCRIBED
before me the 4 day of
February, 1977.

Alyce V. Goff
Notary Public

to Florida Thursday 2/18/71
Israel Bond Luncheon Friday 3/5/71
Israel Bond Dinner Sunday 3/7/71
Gilda Birthday Monday 3/8/71
fire night of 3/8/71
return home morning Tuesday 3/9/71

Edith Apter 700 Forbes Ave..	Manager Apartment house	45 yrs 391/0912
M. Michael Allen 1896 Brushcliff Rd. 15221	owner Treasure Island	50 years 371-4323
Marcella Allen 1896 Brushcliff Rd, 15221	housewife - Community Leader	25 years 371-4323
Stanford (Babe) Aronson 3230 Valwood Dr. Munhall 15120	Partner in Honda Business	462-9046 (923-2866)
Phil Baukin 115 Hartwood Dr	Attorney - community leader	242-5089 (562-8635
Albert Bloom 3242 Beechwood Blvd 15217	Editor Jewish Chronicle	18 Years 421-2724 (687-1000)
Dave Bregman 5929 Nicholson St 15217	Westinghouse - Scout Leader	15 years 521--3362
Kitty Breskin 6630 Northumberland St 15217	Housewife	45 years 421-4310
Harry Caplan 5847 Beacon St 15217	Attorney	421-6730 (261-0784)
Judge William Cercone 130 Derwent St Ross Thp 15237		12 years 364-0983 (261-)789)
Richard Robert Chamovitz 10 Bertlet St		10 years 422-8 233(office 681-7654

EXHIBIT "A"

Richard Cohen — Ex.-Dir. Squirrel Hill Coalition 10years
office 2012 Murray Ave 15217 (422-7666)

Al Cousins Noralc&Corp owner — 18 years
1215 Beechwood Blvd 15217 — 362-8330 (361-6628)

NickDi Battista — contractor
199 Sunset Dr.15235 — 824-5102

Irving Elbling — Westinghouse-Community leader — 23 years
1437 Severn St. 15217 — 421-9071

Herman Engelberg — realtor -community leader — 50 years
1229 Beechwood Blvd 15217- — 361-6250 (687-7628)

Elliot Falk — Controller Robert Morris College -neighbor
223 Anita Ave 15217 — 521-9088

Herman Fineberg — Iron City Uniform-Neighbor — 50years
Kenmawr Apartments.15217 — 661-0494(621-2001)

Sidney Fineberg — Salesman — 40years
6417 Monitor St, 15217 — 521-6129

Leonard Fischler — Oliver Dress Shops-former neighbor — 10years
4742 Center Ave. Apt 1421 — 621-0982 (281-4951)

Norton Freedel — Insurance Agent -neighbor
232 Anita Ave.15217 — 521-7776 (281-4228)

Leslie Friss — Jewish War Veterans-cousin — 18years
2112 Eighteen Ave. 15217 — 421-3779

Kanny Gold — Real Estate — 45years
158Westland Dr. 15217 — 421-4136 (621-0384)

Oscar Goldberg — Pharmacist — 15years
5918 Beacon St,15217 — 41-3161 (861-4333)

Rabbi Moshe V. Goldblum — 15 years
6403 Beacon St15217 — 4214508 (421-2288)

Edward Goldston — Real Estate Appraiser — 12 years
5637 Northumberland St, 15217 — 422-9933(281-5779)

Linda Goldston — Attorney — 8 years
5637 Northumberland St. 15217 — 422-9933 (562-8635)

Sidney Greenberger — IRS -neighbor — 20years
2825 Pennwald Rd. 15217 — 421-2123

Myron Horowitz — Plumber — 30years
222 Coltart Sq — 621-0504

Isadore Horne — American Mirror& Glass - Community leader
1151 Brintoll St. 15201 — 781-8288 (242-7580)

Bernice Katz — Jewler - neighbor — 18 years
227 Anita Ave. 15217 — 521-7120 (471-3030)

Doris Kalabach — bookeeper-employee — 5 years
205 Chaplin Dr. Coreopolis — 264-5644 (923-2866)

Dave Kanchau — Mechanic -employee
% Mon Valley Cycle — (923-2866)

Chester Keith — Bank Vice-president — 20 years
108 Creek Vue Dr. Glenshia — 443-6259
326 Castlegate Rd. 15221

Don Landis — Epic Corp — 20years
1323 Brinton Rd — 243-3077

Saul Langsner — Salesman — 50years
14 Fairfield Ct — 361-7160

Saul Leff — BL Cream - Albor &Leff — 50years
5825 Fifth Ave — 363-4231 (441-7700)

Bill Lucas — AAA Trans — 10 years
3244 May St. 15228 — (462-5040)

Bill Lucas Jr (Butch) — Mechanic - employee
% Mon Valley Cycle — (923-2866)

Arthur Maharam 6708 Wilkens Ave. 15217	Scientist 422-8475	27 years
Morton Markowitz 2789 Beechwood Blvd 15217	Engineer 521-0506 (682-2893)	18 years
Mildred Menlowe 151 N. Craig St -	Dir.Women's Div Israel Bonds 683-0305 (471-7929)	12 years
Albert Myers 851 8 St Verona	Electrician 828-7174 (661-8800)	15 years
Jack Meyers	Meyers Plumbing (471-0772)	15 years
Morris Pearl 5620 Hobart St15217	Retired 421-5818	40 years
Tom Quinn 4002 Saybrook 15146	Union Business Agent 372-7655	33 years
Stanley Rosecrans 6632 Rosemoor St. 15217	Westinghouse 421- 5408	48 years
Herbert Schnabe 5421 Beacon St 15217	Salesman 521-8626	15 years
Harvey Schwartz 3075 Beechwood Blvd 15217	Ex. Dir. Jewish Natl Fund 521-1890 (521-6866)	13 years
Albert Shapira 214 Anita Ave.15217	Attorney - neighbor 421-9208 (601-1505)	42 years
Joe Skaro 720 Wood St	Contractor 371-1805	18-20 years
Rabbi Morris Sklar 2331 Tilbury St. 15217	 421-9657 (421-2288)	12 years

Nate Smith 2140 Mc Kean - 243-8857	 8 years	
Albert Smolover 5625 Marlboro Rd. 15217	Ins. Agent - Community leader 521-6794	20years
L. Stiener (Hank) Speer 2309 Main St	Hearting- Air Cond. Centr 461-5531	10 years
Ed Stienfeld 4741 Coleridge St.	Ex. Dir. Histadrut 362-1667 (421-4434)	40 years
Jugo Silvestri Silvestri 1173 Beechwood Blvd 15217	66121455	
Cantor Moshe Taubé 6511 Bartlett St. 15217	 421-5924 (421-2288)	10 years
Mel Taylor 521-3090 6352 Douglas St 15217 Phone	Public Relations 422-9267	25 years
Dr Burton Tucker 1489 Laurel Dr. 15235	Dentist 823-8844 (342-7980)	20years
Sam Verman 2211 Beechwood Blvd 15217	Developer -retired 421-4745	25years
Harry Wagner 401 Shady Ave	Insurance Agent - Community leader 362-4114 (281-4228)	40years
Dr Cyril Wecht* 5420 Darlington Rd 15217	 521-2881 (281-9090) (621-8866	10 years
Mathew Weisberg 16 Darlington Ct 15217	Merchant 521-6257 (321-7616)	10 years
Shirley Wildon Housewife 5831 Darlington Ave 15217	 421-3284	40years

Character Witness to have been called

Name	address	Position	age	tel. #
Nate Smith	7140 McPherson Blvd	Electric Company Lineman	(48)	241-88[illegible] / 355-6[illegible]
Thomas Quinn	4602 Berger Lane-15146	Underwriters Agent	(33)	372-76[illegible]
David Breyman	5929 Nicholson-15217	Westinghouse Steam Repair Foreman	(45)	521-33[illegible]
Albert Cerisano	1215 Beechwood Blvd	Owner Ronald Corp	(18)	362-83[illegible] / 361-66[illegible]
Rabbi Asher	2331 Fillmore St	Beth Shalom and Rabbi	(12)	421-96[illegible] / 421-22[illegible]
Albert Smolover	5025 Northumberland St	Insurance Agent Prudential - Pres	(20)	521-67[illegible]
Melvin Taylor	6355 Douglas St	Beth Shalom Syn		
Herman Finkery	Kennywood Park Shady Lane	Bravo Corp - Public Relations Head of Iron City Uniform - Co)	(25) (40)	422-47[illegible] / 566-30[illegible] / 661-24[illegible] / 621-10[illegible]
Gordon Horne	1151 Brintle	American Home Products Corp	(17)	781-82[illegible] / 242-75[illegible]

This is the list and order of calling of character witnesses selected by Atty Bowers from the larger list submitted. They were notified on Wednesday nite by Gilbert not to come the next day.

A larger number than the above were also willing to be called as character witnesses

EXHIBIT "B"

CERTIFICATE OF SERVICE

Service of a true and correct copy of the within Affidavit of David Neustein in Support of Motion for New Trial made on Carl LoPresti, Esquire, c/o the Office of the United States Attorney, 633 U. S. Post Office and Courthouse, Pittsburgh, Pennsylvania 15219, and on Charles F. Bowers, Jr., Esquire, 826 Merchant Street, Ambridge, Pennsylvania 15003, the 4th day of February, 1977, via U.S. mail, postage prepaid.

Harold Gondelman

Attorney for David Neustein

No. 77-584

In the Supreme Court of the United States

OCTOBER TERM, 1977

DAVID NEUSTEIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that his trial counsel's failure to interview potential witnesses and call them to testify denied him effective assistance of counsel.

1. Following a jury trial in the United States District Court for the Western District of Pennsylvania, petitioner was convicted on September 8, 1976, of conspiring to defraud insurance companies by destroying a building by arson, and of use of the mails in carrying out the fraudulent plan, in violation of 18 U.S.C. 2, 371, and 1341. On September 13, 1976, petitioner, through his privately retained trial counsel, filed a motion for a new trial and in arrest of judgment pursuant to Rules 33 and 34, Fed. R. Crim. P. After conducting an extensive hearing, the district court denied these motions.

On February 4, 1977, through new counsel,[1] petitioner filed a second motion for a new trial pursuant to Rule 33, claiming ineffective assistance of counsel at trial. The motion was accompanied by an affidavit of petitioner (Pet. App. D) principally alleging that trial counsel had failed to interview and call to testify certain potential witnesses whose names had been supplied by petitioner. The district court denied this second motion as untimely, see Rule 33, Fed. R. Crim. P., and as "lacking merit" (Pet. App. 5a).[2] The court concluded (*ibid.*) after "[a] review of the * * * record * * * that defense counsel was competent. He is a mature attorney of considerable experience in this court."

Following the denial of this second new trial motion, petitioner was fined $14,000, and was sentenced to five years' imprisonment on each of five counts, the terms to run concurrently. The court of appeals affirmed (Pet. App. A).

The evidence at trial, which included testimony of an unindicted co-conspirator directly implicating petitioner (*e.g.*, C.A. App. 416a-423a),[3] showed that petitioner conspired with several others to burn his wife's warehouse and its contents and thereafter defraud several banks and

[1]Petitioner's trial attorney, upon his own motion to withdraw, had been relieved as counsel for petitioner.

[2]We rely on the district court's disposition of petitioner's claim on the merits, rather than on the ground that his motion was untimely, since the claim would have been timely and cognizable, after sentence was imposed, as a motion under 28 U.S.C. 2255.

[3]"C.A. App." refers to the appendices filed in the court of appeals. C.A. App. 1a-926a was filed by petitioner; C.A. App. 1b-8b was filed by the United States.

insurance companies by collecting the insurance proceeds as the loss payee under the policies. A fire by arson occurred at the warehouse on March 8, 1971 (see C.A. App. 647a).[4]

2. Petitioner's claim of ineffective assistance of counsel must be measured against the requirement that his counsel's performance be within the "range of competence demanded of attorneys in criminal cases" (*McMann* v. *Richardson*, 397 U.S. 759, 771; see *Tollett* v. *Henderson*, 411 U.S. 258, 268).[5] Judged by this standard, or by any standard articulated by the courts of appeals,[6] petitioner's counsel was competent.

The witnesses whose names had been supplied by petitioner to trial counsel were not alibi witnesses or people with first-hand knowledge of exculpatory information; petitioner's affidavit instead indicates that they were character witnesses (Pet. App. 9a). In a bench conference during the trial, petitioner's counsel indicated (C.A. App. 1b-2b) that he "had intended to call five, six or seven character witnesses" but that he was concerned that if he

[4]Petitioner thereafter sued the insurance companies for the proceeds of the policies. As petitioner states (Pet. 3), a jury found for petitioner in these suits despite the insurance companies' assertion of arson as a defense. But only one of petitioner's co-conspirators testified at that trial (C.A. App. 647a, 747a-748a) and that co-conspirator, who subsequently was granted immunity, testified at petitioner's criminal trial that he had lied at the civil trial to protect himself (C.A. App. 89a, 95a-96a). Notwithstanding the outcome of petitioner's civil suit, the evidence against petitioner in his criminal trial was very strong and amply supported the jury's verdict. Petitioner does not contend otherwise.

[5]This standard applies both to counsel's courtroom performance and to his out-of-court investigation and preparation of the case. *Moore* v. *United States*, 432 F. 2d 730, 739 (C.A. 3).

[6]There is, as petitioner suggests (Pet. 7-9), an apparent divergence of views among the circuits as to the proper standard for testing claims of incompetent counsel. Several circuits recently have rejected

did so the government on cross-examination would seek to introduce evidence that implicated petitioner in other instances of arson and discussions of arson.[7] Petitioner's counsel said (C.A. App. 2b) that "if there's the possibility that" the government would introduce such rebuttal evidence, "I will not produce character evidence * * *."

The court would venture only "a tentative opinion" in advance on the scope of rebuttal that the government could pursue (C.A. App. 5b), but stated its understanding of the law to be "that if a man calls character witnesses and places his character in evidence * * * then his character is open to attack" and that " '[o]n cross-examination, inquiry [would be] allowable into relevant specific instances of conduct' " (C.A. App. 3b, quoting from Rule 405, Fed. R. Evid.). The government prosecutor stated (C.A. App. 6b-7b) that he would indeed seek to introduce evidence of petitioner's "boast" of an earlier arson if petitioner's counsel introduced character testimony.

Under these circumstances, counsel's decision not to call character witnesses must be deemed a tactical decision

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the traditional "farce and mockery" test (*e.g., Beasley* v. *United States*, 491 F. 2d 687 (C.A. 6); *United States* v. *DeCoster*, 487 F. 2d 1197 (C.A. D.C.); *West* v. *Louisiana*, 478 F. 2d 1026 (C.A. 5), vacated in part and remanded, 510 F. 2d 363; cf. *United States* v. *Yanishefsky*, 500 F. 2d 1327, 1333, n. 2 (C.A. 2)) and in its stead have adopted a standard of "reasonableness" that they consider to be less stringent. But even if the existing difference among the circuits otherwise constitutes a significant conflict concerning the constitutional minimum, petitioner's representation at trial was competent and constitutionally adequate under any of the standards. Cf. *Dunker* v. *Vinzant*, 505 F. 2d 503 (C.A. 1), certiorari denied, 421 U.S. 1003. This case thus presents no occasion for the resolution of differences that may exist in the general standards enunciated by the courts of appeals.

[7]Petitioner's counsel so far had been successful in objecting to the introduction of this evidence (C.A. App. 287a, 459a-460a, 555a-556a).

that is well within the range of normal competency. See *United States ex rel. Walker* v. *Henderson*, 492 F. 2d 1311, 1313-1314 (C.A. 2), certiorari denied, 417 U.S. 972. The character witnesses would not have contradicted the government's strong case against petitioner, yet their use would have opened the door to the introduction of very damaging evidence concerning petitioner's past conduct and statements. Thus the record in this regard amply supports the district court's finding (Pet. App. 5a) that "defense counsel was competent."

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

JANUARY 1978.

DOJ-1978-01